IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-906

UNITED AIR LINES, INC.,
Petitioner,

vs.

HARRIS S. McMANN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Opinion of the District Court for the Eastern District of Virginia, Alexandria Division, dated September 2, 1975, is not officially reported. A copy appears in the Appendix to the Petition at page A1. The Opinion of the Court of Appeals for the Fourth Circuit, dated October 1, 1976, is reported at 542 F.2d 217. A copy appears in the Appendix to the Petition at page A5.

JURISDICTION

Petitioners assert this Court's jurisdiction under 28 U.S.C. § 1254(1). Respondent does not question this jurisdiction.

QUESTION PRESENTED

Does the Age Discrimination in Employment Act of 1967, as amended, permit involuntary retirement prior to age 65 pursuant to a retirement plan adopted prior to the passage of the Act, when such plan would admittedly be in violation of the terms of the Act if adopted after the effective date of the Act?

STATUTE INVOLVED

Section 4(f)(2) of the Age Discrimination in Employment Act of 1967, as amended, (29 U.S.C. § 623 (f)(2)) is set forth at page 2 of the Petition, Sections 4(a) and 4(f) of the Age Discrimination in Employment Act of 1967 (hereinafter "ADEA" or the "Act") are set forth at page A14 of the Appendix to the Petition. However, Respondent makes the following addition of Section 2 of the Act: Section 2 [29 U.S.C. § 621]

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

STATEMENT OF THE CASE

This is an action brought by Mr. Harris S. McMann (hereinafter "McMann"), a retired former employee of Petitioner United Air Lines, Inc. (hereinafter "United") requesting injunctive relief, reinstatement and back pay under the Act as a result of his involuntary retirement by United at age 60. United based his retirement on his participation in a retirement income plan which covered him and other employees in his job classification.

The facts were stipulated. McMann was born January 23, 1913 and was hired by United April 14, 1944. He continued to serve in the employ of United in various capacities until United forced him to retire. His most recent position was that of "Technical Specialist —Aircraft Systems".

At the time McMann was hired by United in 1944, United had in effect the retirement income plan which provided retirement benefits to employees who were eligible to join and who did join the plan.

McMann did not elect to join the plan until January 23, 1964. At that time, McMann applied for participation in the plan with an effective date of February 1, 1964. McMann participated in the "non-union flight plan" initially, but in June 1965 he was transferred from that plan to the "pilots' pension plan". At various times during his participation in the plan, McMann was sent annual statements and summaries of the plan. All relevant materials he received regarding the benefits of the plan and his participation in it described the "normal retirement age" as age 60.

On January 23, 1973, McMann reached his 60th birthday. On February 1, 1973, the first day of the month following his 60th birthday, McMann was involuntarily retired by United.[1] Shortly before his retirement, McMann served notice on the Secretary of Labor of his intent to sue based upon United's alleged violation of the Act in requiring him to retire at age 60. No satisfactory resolution of the case was reached through this channel and, on January 31, 1975, McMann filed suit in the U.S. District Court for the Eastern District of Virginia, Alexandria Division. McMann asserted that his involuntary retirement constituted an act of age discrimination and was unlawful under the Act. United, in its Answer, raised the defense that McMann's retirement was in accordance with the terms of a *bona fide* employment benefit plan within the meaning of Section 4(f)(2) of the Act.

[1] It is interesting to note that, although United forced McMann to retire at age 60, UAL, Inc., United's holding company, recently asked its Chief Executive Officer, Edward E. Carlson, to continue working beyond age 65, presumably his "normal retirement age". *Hanging in There After 65*, BUSINESS WEEK (January 17, 1977) 20, 21.

On July 15, 1975, McMann and United entered into a stipulation of facts. Both parties moved for summary judgment and on August 1, 1975, the matter came before the District Court for a hearing. On September 2, 1975, the District Court, Judge Albert V. Bryan, Jr., presiding, granted United's motion for summary judgment and dismissed McMann's suit. McMann appealed this decision to the Court of Appeals for the Fourth Circuit.

In the Court of Appeals, the Secretary of Labor entered the case and filed a brief *amicus curiae* on behalf of McMann. In the Court of Appeals, McMann argued that United's action in forcing him to retire at age 60 constituted a violation of the Act, and that the exemption provided in Section 4(f)(2) of the Act was, under the circumstances, not available to United.

United argued that the District Court's decision was proper in that the Act expressly permits an employer to ". . . observe the terms of any *bona fide* employee benefit plan . . . which is not a subterfuge to evade the purposes of this Act. . . ." United further argued that because the plan was instituted many years before the Act was passed, it could not possibly be considered a subterfuge to evade the purposes of the Act.

At oral argument, United's counsel, responding to a question from the Court, conceded that its plan, if adopted at the present time, would probably violate the Act.[2]

The Court of Appeals entered its Opinion on October 1, 1976, and reversed the District Court. The Court

[2] This concession was noted by the Court of Appeals in its Opinion, 542 F.2d 217, 221.

ruled merely because a pension plan had been in existence prior to the passage of the Act, it did not follow that such a retirement plan was automatically not a subterfuge to evade the purposes of the Act. The Court of Appeals remanded the case to the District Court. United then filed its Petition for a Writ of Certiorari on December 30, 1976.

REASONS FOR DENYING THE WRIT

I. The Petitioner Has Not Complied With the Rules of This Court

This Court has promulgated rules of pleading and practice governing the requirements and conduct of cases before it. Supreme Court Rule 23 determines the contents of a Petition for Writ of Certiorari. Failure of a Petitioner to comply with these rules will result in the Court's denial of a Petition for Writ of Certiorari. Rule 23(1)(g) of this Court provides as follows:

> "If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance."

This requirement for jurisdictional statement is similar to that found in Fed. R. Civ. P. 8(a), which requires "a short and clear statement of the grounds upon which the court's jurisdiction depends, . . ." The preferred method for stating jurisdiction is that found in Official Form 2 which accompanies the Federal Rules of Civil Procedure. The illustrative format cites the Act of Congress which gives the court jurisdiction, regardless of the type of jurisdiction. A failure to show jurisdiction in the complaint will result in the dismissal of the suit in the District Court. *KVOS, Inc.* v. *Associated Press,* 299 U.S. 269 (1936).

The statement of the case in the Petition for a Writ of Certiorari is completely devoid of any allegation of the jurisdiction of the Trial Court.

Respondent submits that the Petitioner's failure to comply with the rules of this Court should bar the petitioner from being granted the relief it requests.

II. There Is No Real Conflict Between the Circuits

Petitioner and *amicus* cite three cases to the Court in order to establish a conflict between the Circuits of the United States Court of Appeals. They cite *Brennan* v. *Taft Broadcasting Co.,* 500 F.2d 212 (5th Cir. 1974); *de Lorraine* v. *MEBA Pension Trust, et al.,* 499 F.2d 49 (2nd Cir.), *cert. denied,* 419 U.S. 1009 (1974), and *Steiner* v. *National League of Professional Baseball Clubs,* 377 F. Supp. 945 (C.D. Cal. 1974), *aff'd.* No. 74-2604 (9th Cir. 1975).

As noted previously, at oral argument in the Court of Appeals, Counsel for Petitioner acknowledged that if its pension plan were adopted today, it would probably be in violation of the terms of the Act. The effect of this admission limits the scope of the question presented. The question becomes only whether or not the age of the employee benefit plan can, by itself, excuse the mandate of Congress as reflected in the Act.

Steiner, supra, was decided without opinion by the Ninth Circuit. Rule 21(c) of the Ninth Circuit states that such a disposition "shall not be regarded as precedent . . ." Thus, although the case was decided by the Ninth Circuit, that Court's own rules prevent the consideration of the case to establish a conflict among Circuit Courts of Appeal. The Second Circuit in

de Lorraine merely stated its opinion that, because a pension plan antedated the Act, it could not be a subterfuge. That Court, however, did not really consider the issue. It merely said that because it paid benefits and was established before the passage of the Act, the trust was not a subterfuge to evade the purposes of the statute. No basis was given by the Court for the statement, and no examination of the statutory language was undertaken. *de Lorraine* turned not on the question of subterfuge, but rather on the question of whether or not the plaintiff showed any discriminatory effect of the defendant's actions. The Fifth Circuit in *Taft Broadcasting* again did not really consider the issue. The sole language in *Taft Broadcasting,* regarding the question of whether or not a plan which antedated the Act could be a subterfuge, was simply that the plan "was effectuated far in advance of the enactment of the law, eliminating 'any notion that it was adopted as a subterfuge for evasion" (500 F.2d at 215). The court did not consider whether or not a plan could be a subterfuge to evade the purposes of the Act, even though it was in effect before the passage of the Act.

Thus, the Fourth Circuit in *McMann* was the first court to seriously consider the "subterfuge clause" of the Act. As the Fourth Circuit pointed out, what is forbidden is not a subterfuge to evade the Act, but a subterfuge to evade the purpose of the Act. Clearly, the language of the statute can apply to pre-existing pension plans. This was a primary holding of the Court in *McMann.* The purposes of the Act do not change merely because of the time element of a pension plan. The purposes are the same regardless of whether the plan involved is new or old.

The only other circuit to squarely confront the question of whether or not a pre-existing plan can still be considered a subterfuge to evade the purposes of the Act is the Third Circuit. In *Zinger* v. *Blanchette,* — F.2d — (3rd Cir. 1977), decided on January 20, 1977, the Court agreed with *McMann* in holding that a retirement plan which pre-dated the Act can be a subterfuge.

Respondent submits that when the question presented in this case is properly addressed there is not conflict between the Circuit Courts of Appeal. Petitioner admitted on oral argument that if its plan were implemented today it would probably be in violation of the Act. The question is then narrowed to whether a plan which antedated the Act can or cannot be a subterfuge to evade the purposes of the Act. The Courts in *McMann* and *Zinger* are consistent, and these two courts are the only ones which have fully examined the question. There is, therefore, no conflict among the circuits.[3]

III. The Decision of the Court of Appeals Is Not in Conflict With This Court

The Chamber of Commerce of the United States, as *amicus curiae,* urges this Court to grant the Petition for Writ of Certiorari on the grounds that the Fourth Circuit's decision conflicts with certain decisions of this Court. In support of this contention, the *amicus* cites *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and *General Electric Co.* v. *Gilbert,* Nos.

[3] The *amicus,* it should be noted, agrees with this view of the "subterfuge clause". Brief of the Chamber of Commerce of the United States of America as *amicus curiae* at 5, n. 3.

74-1589 and 74-1590, 45 U.S.L.W. 4031 (U.S. Dec. 7, 1976). All three of these cases involve the validity of employment skills and ability tests. The *amicus* quite correctly states that the rule in such cases is that the employers have the burden of establishing that their tests are in fact job related. However, if an employer does this the complaining party must show, under Title 7 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e (1970), that other tests without the undesirable racial effect would also serve the employer's interest.

The *amicus* contends that the Fourth Circuit put a different burden on employers when it requires that the employer must prove the non-existence of a subterfuge as well as the actual benefits of its retirement plan. Respondent submits that the approach taken by the *amicus* is clearly not appropriate to the present issue. It is instead a classic example of adding apples and oranges. In the job testing cases, there is a possibility that many other tests will measure the same skills as a test which may have discriminatory results. While dealing with age discrimination, however, there are not such alternative methods. The discriminatory effect of a validated test may well be inadvertent. However, in an age discrimination case, discrimination on the basis of age is the sole purpose of the retirement plan. The burden on the employer is therefore whether or not the plan can be justified on some other basis.

These cases, cited by the *amicus,* do not deal with the same type of problem or issue that the Court is presented with in the instant case. Respondent therefore suggests that the decision of the Fourth Circuit is not in conflict with the applicable decisions of this Court.

CONCLUSION

For the reasons stated above, Respondent respectfully requests this Court to deny United's Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

FRANCIS G. MCBRIDE
Attorney for Respondent

February 2, 1977